

### **REMARKS**

Claims 1-19 and 21 are currently pending. Claims 4,12, and 19 are amended herein. Support for the amendments can be found in the application and claims as originally filed. No new matter is added. Each of the Office Action's rejections is addressed below.

#### **Claim Objections**

The Examiner objected to Claims 4 and 13. Claim 4 is amended herein to correct a typographical error. Claim 12 is amended herein to recite a pH range of 5.0-6.3, thereby mooted the objection to Claim 13. Support for the amendment to Claim 12 can be found in paragraph [0039] of the application as published. Applicants respectfully request withdrawal of these objections.

#### **Rejections under 35 U.S.C. § 102**

Claims 1-3, 8-18, and 21 stand rejected under 35 U.S.C. § 102(b) as anticipated by EP 0162498 to Ottenhof (hereinafter "Ottenhof").

Anticipation under Section 102 can be found only if a reference shows exactly what is claimed. *Titanium Metals Corp. v. Banner*, 778 F.2d 775 (Fed. Cir. 1985). More particularly, a finding of anticipation requires the disclosure in a single piece of prior art of each and every limitation of a claimed invention. *Electro Med. Sys. S.A. v. Cooper Life Sciences*, 34 F.3d 1048, 1052 (Fed. Cir. 1994).

The Examiner found Ottenhof to disclose a process for preparing a dairy product without removing whey.

Applicants respectfully disagree with the Examiner's characterization of Ottenhof because the process of Ottenhof teaches that whey is removed during the processing steps. Ottenhof teaches a process for preparing a product containing casein and whey protein, but some whey is separated from the curd and thus is removed in the process. For example, Ottenhof states "[t]he curd can be separated in a known manner, for example by means of decanting or centrifuging or by means of sieving or gauze filtering." Page 4, ll. 24-26. It would be clear to one of skill in the art that the curd is being separated from the whey. Whey is the liquid phase formed on the curdling of milk. For example, Merriam-Webster's Online Dictionary defines

whely as a noun as “the watery part of the milk that is separated from the coagulable part or curd especially in the process of making cheese and that is rich in lactose, minerals, and vitamins, and contains lactalbumin and traces of fat.” Merriam-Webster’s Online Dictionary Definition for whey attached at the end of this response.

Other statements in the Ottenhof further support that the whey is separated from the curd. For example, “[i]t is preferable to heat the milk product before the curd *is* separated.” Page 4, ll. 26-27 (emphasis added). Further, all of the examples teach that whey is separated from the curd by a decanting apparatus. See page 8, line 20 to page 11, line 9. Example I states that the “curd formed was separated by means of a Westfalia decanting apparatus, model SDA 230. Page 8, ll. 36-37. Examples II-V use methods similar to Example I to separate whey from the curd.

While the final product of Ottenhof may contain some denatured whey, whey is still removed during processing steps when the serum is decanted from the mixture.

Claim 1 is directed to a process wherein the steps are performed without removing whey. Ottenhof fails to teach this feature. Therefore, Applicants respectfully request withdrawal of this rejection.

Further, this is more than an obvious variation because Ottenhof teaches a process that produces a precipitate from a solution of curds and whey.

Additionally, Applicants submit that Claims 2-3, 8-18, and 21 are also not anticipated by the cited reference, not only because they depend from Claim 1, but also on their own merit.

#### **Rejections under 35 U.S.C. § 103(a)**

It is well settled that the Examiner “bears the initial burden of presenting a *prima facie* case of unpatentability...” *In re Sullivan*, 498 F.3d 1345 (Fed. Cir. 2007). Until the Examiner has established a *prima facie* case of obviousness, the Applicant need not present arguments or evidence of non-obviousness. To establish a *prima facie* case of obviousness, the Examiner must establish at least three elements. First, the prior art reference (or references when combined) must teach or suggest all of the claim limitations: “All words in a claim must be considered in judging the patentability of that claim against the prior art.” *In re Wilson*, 424 F.2d 1382, 165 U.S.P.Q. 494, 496 (CCPA 1970); see also *M.P.E.P.* § 2143.03. Second, there must be a reasonable expectation of success. *In re Merck & Co., Inc.*, 800 F.2d 1091, 231 U.S.P.Q. 375

(Fed. Cir. 1986); *Pharmastem Therapeutics v. Viacell, Inc.*, 491 F.3d 1342, 83 U.S.P.Q.2d 1289 (Fed. Cir. 2007); see also *M.P.E.P. § 2143.02*. And finally, the Examiner must articulate some reason to modify or combine the cited references that renders the claim obvious. Merely establishing that the claimed elements can be found in the prior art is not sufficient to establish a *prima facie* case of obviousness. Each of the combinations asserted by the Examiner is addressed below.

**The Proposed Combination of Ottenhof/Bisson Does Not Make Claims 4-7 Obvious**

Claims 4-7 stand rejected as unpatentable under 35 U.S.C. § 103(a) in view of Ottenhof and U.S. Patent No. 5,714,182 to Bisson et al. ("Bisson").

Bisson teaches a process that adds whey proteins to a milk based raw material, which undergoes further processing steps to create a texturizing product. The Examiner found that it would have been obvious to use the casein:whey ratio taught in Bisson in the process of Ottenhof.

Claim 1 is directed to a process wherein the steps are performed without removing whey. As discussed above, Ottenhof fails to teach this feature because whey is removed in the disclosed process. Bisson does not make up for this deficiency because Bisson teaches that liquid is concentrated and removed in an evaporator and spray dried. Bisson, col. 2, ll. 38-41. Therefore, Applicants respectfully request withdrawal of this rejection.

**The Proposed Combination of Ottenhof/Hormann Does Not Make Claim 19 Obvious**

Claim 19 stands rejected as unpatentable under 35 U.S.C. § 103(a) in view of Ottenhof and U.S. Patent No. 6,036,979 to Hormann et al. ("Hormann").

The Examiner found Hormann to teach a method for producing a cheese product comprising adding the cheese product to containers while still liquid, and then providing conditions which allow the packaged product to set.

Hormann teaches separating the whey from the curd by "ultra-filtrating and/or diafiltrating the mixture to a dry matter content over 25% wt". Col. 1, ll. 47-48. Hormann also teaches that "the curdled cheese milk is ultrafiltrated until the solids content of the retentates is 28% wt. Col. 2, ll. 5-8. Therefore Hormann teaches separation of the whey.

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**Filing Date:** August 1, 2006

Claim 19 is directed to a process wherein the steps are performed without removing whey. As discussed above, Ottenhof fails to teach this feature. Hormann does not make up for this deficiency. Therefore, Applicants respectfully request withdrawal of this rejection.

No Disclaimers or Disavowals

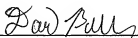
Although the present communication may include alterations to the application or claims, or characterizations of claim scope or referenced art, Applicants are not conceding in this application that previously pending claims are not patentable over the cited references. Rather, any alterations or characterizations are being made to facilitate expeditious prosecution of this application. Applicants reserve the right to pursue at a later date any previously pending or other broader or narrower claims that capture any subject matter supported by the present disclosure, including subject matter found to be specifically disclaimed herein or by any prior prosecution. Accordingly, reviewers of this or any parent, child or related prosecution history shall not reasonably infer that Applicants have made any disclaimers or disavowals of any subject matter supported by the present application.

Please charge any additional fees, including any fees for additional extension of time, or credit overpayment to Deposit Account No. 11-1410.

Respectfully submitted,

KNOBBE, MARTENS, OLSON & BEAR, LLP

Dated: January 21, 2009

By:   
\_\_\_\_\_  
David K. Buckingham  
Registration No. 60,695  
Attorney of Record  
Customer No. 20,995  
(415) 954-4114

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Main Entry: **whey** *n*

Pronunciation: \hwā, 'wā\

Function: *noun*

Eymology: Middle English, from Old English *hwæg*; akin to Middle Dutch *wey*  
*why*

Date: before 12th century

: the watery part of milk that is separated from the coagulable part or curd especially in the process of making cheese and that is rich in lactose, minerals, and vitamins and contains lactalbumin and traces of fat  
— **why-like** *n* *adj*

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